No. 91715-9

SUPREME COURT OF THE STATE OF WASHINGTON

SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 925,
Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,
Respondent,

and

FREEDOM FOUNDATION,
Respondent/Cross-Appellant.

REPLY OF CROSS-APPELLANT/RESPONDENT FREEDOM FOUNDATION

Attorneys for Cross-Appellant/Respondent Freedom Foundation

DAVID M. S. DEWHIRST, WSBA #48229
JAMES G ABERNATHY, WSBA #48801
STEPHANIE D. OLSON, WSBA #50100
FREEDOM FOUNDATION
P.O. Box 552, Olympia, WA 98507
Phone (360) 956-3482, Fax (360) 352-1874
DDewhirst@myfreedomfoundation.com
JAbernathy@myfreedomfoundation.com

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I. ARGUMENT

Abraham Lincoln once quipped, "Many silly reasons are given, as is usual in cases where a single good one is not to be found."[1] Appellant SEIU 925 ("SEIU") argues numerous legal theories to support nondisclosure, but those theories squarely conflict with precedent, lack relevant applicability to the instant case, or far exceed the limits of plausibility. Freedom Foundation ("the Foundation") did not request the instant public records for commercial purposes, and no Public Records Act ("PRA") exemptions or constitutional provisions bar the State from disclosing them.

Additionally, SEIU's arguments are as unavailing as they are dangerous to the PRA's broad pro-disclosure policy that supports "the public's right to a transparent government." *Nissen v. Pierce Cnty.*, 183 Wn.2d 863, 357 P.3d 45, 53 (2015). It is that strong policy and substantive right that "guides [this Court's] interpretation of the PRA." *Id.* Accordingly, *any* limitations on disclosure should be *narrowly construed*—especially restrictions as sweeping as those SEIU now urges this Court to adopt. *See* RCW 42.56.030; *see also Nissen*, 367 P.3d at 53; *see also Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005). To accept SEIU's arguments, this Court must dramatically reshape the PRA and

[1] MICHAEL BURLINGAME, ABRAHAM LINCOLN: A LIFE, 215 (2008).

transform its pro-disclosure policy into a policy which burdens requestors and chills public records requests. Precedent, policy and equity require a rejection of SEIU's arguments.

A. *SEIU LACKS STANDING TO SEEK AN INJUNCTION ON THE BASIS OF EXEMPTIONS IN RCW 42.56.230 AND THE COMMERCIAL PURPOSE PROHIBITION IN RCW 42.56.070(9).*

1. Division II's Ameriquest decision is inapposite to the question of standing to seek a PRA injunction.

Standing rulings are reviewed *de novo*. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). SEIU contends that once it achieves associational standing as to any claim, it "has standing under RCW 42.56.540 to sue to enjoin the disclosure by DSHS of that record under any legal theory it might choose to invoke." *See* Appellant/Cross-Respondent's Reply/Cross-Response ("SEIU Reply") at 30. For support, it relies upon *Ameriquest Mortgage Co. v. State Atty. Gen.* ("Division II *Ameriquest*"), 148 Wn. App. 145, 166, 199 P.3d 468, 477 (2009) *aff'd on other grounds sub nom. Ameriquest*, 170 Wn.2d 418, 241 P.3d 1245 (2010).[2] Yet SEIU entirely misrepresents *Ameriquest*'s holding. On the contrary, Division II

[2] Specifically, SEIU relies upon two sentences from the Division II *Ameriquest* decision. "Ameriquest is a party that will be affected by the disclosure of the AGO's work product, and thus, it has standing to challenge the AGO's decision to disclose documents related to it. Ameriquest may also challenge the AGO's decision to waive applicable exemptions." *Id.* at 166. Simply reading the surrounding sentences places these broad statements in their appropriate context—standing to challenge to arbitrary and capricious government behavior, not standing to challenge public records disclosure under RCW 42.56.540.

Ameriquest explains the broad standing available to parties who wish to challenge arbitrary and capricious government action outside of the PRA. *Id.* "[A] party that will be affected by" a government action "*with standing* [implying that standing must *already* exist] has a fundamental right to have [an] agency abide by the constitution, statutes, and regulations which affect the agency's exercise of discretion. *Id.* Division II concluded that the Ameriquest Co. was unlikely to meet the "extraordinarily high bar" it must to enjoin government action it claimed was "arbitrary and capricious"—and made its ruling apart from any reference to the PRA and its distinct analytical structure. *Id.* at 167.[3] Lacking any PRA analysis, Division II *Ameriquest* is inapposite to the issue of private party standing under the PRA. The trial court erred to the extent it ruled otherwise.

SEIU is patently incorrect that Division II *Ameriquest* "conclusively establishes that any party that will be affected by a disclosure of documents pursuant to the PRA has standing to challenge an agency's decision to disclose on any grounds," SEIU Reply at 29, because Division II *Ameriquest* discussed standing requirements for a party challenging "arbitrary and capricious" government action, not RCW 42.56.540's

[3] Additionally, Division II *Ameriquest* does not apply because SEIU never claimed that DSHS's behavior was arbitrary and capricious, "a willful and unreasoning action, without consideration and in disregard of facts and circumstances." *Id.* at 166. On the contrary, an "action is not arbitrary and capricious even though [SEIU] may believe an erroneous conclusion has been reached."

standing requirements a private party must meet to enjoin disclosure of records under the PRA. *Ameriquest*, 148 Wn. App. at 166.[4]

Therefore, SEIU must possess standing under RCW 42.56.540 to argue each and every claim it presses to support nondisclosure: RCW 42.56.230(2)(a)(ii), RCW 42.56.230(1), and RCW 42.56.070(9). *See Lewis v. Casey*, 518 U.S. 343, 358, n. 6, 116 S. Ct. 2174, 135 L.Ed.2d 606 (1996) ("Standing is not dispensed in gross."); *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734, 128 S. Ct. 2759, 2769, 171 L. Ed. 2d 737 (2008) ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.") (internal quotations omitted). As explained below, SEIU cannot establish standing.

2. RCW 42.56.540 and its case law provide the appropriate standing requirements.

Instead, standing analysis should begin with well-settled standing rules. SEIU asserts standing to seek an injunction solely through RCW 42.56.540. *See* SEIU Reply at 30; *see also* CP 7, 15. RCW 42.56.540 grants standing to "***a person who is named in the record or to whom the record specifically pertains***."[5] *Ameriquest Mortgage Co. v. Office of Attorney Gen. of*

[4] Even if it modifies the standing requirements in RCW 42.56.540, Division II *Ameriquest* was overruled by this Court in *Ameriquest Mortgage Co. v. Office of Attorney Gen. of Wash.*, 177 Wn.2d 467, 486-87, 300 P.3d 799, 809 (2013), which reaffirmed RCW 42.56.540's heightened standing requirement.

[5] Section 540's distinct standing requirements exemplify the PRA's pro-disclosure policy.

Washington, 177 Wn.2d 467, 486-87, 300 P.3d 799, 809 (2013) ("If it is another party, besides an agency, that is seeking to prevent disclosure, then that party must seek an injunction. RCW 42.56.540. In such a case, *the party must prove (1) that the record in question* ***specifically pertains to that party***...") (emphasis added).[6] Finally, an association may bring suit on behalf of its members when it satisfies each of the following criteria:

> (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; *and* (3) neither claim asserted nor relief requested requires the participation of the organization's individual members... [T]he first two prongs are constitutional in that they ensure that article III, section 2's 'case or controversy' requirements are satisfied.

Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-15, 45 P.3d 186, 189 *amended on denial of reconsideration*, 50 P.3d 618 (2002) (emphasis added).[7] Because the records do not specifically pertain to SEIU, it asserts associational standing. SEIU Reply at 27-28.[8]

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[6] The PRA thus echoes and *augments* the general common law principle that "[c]ases should be brought and defended by the parties whose rights and interests are at stake." *Riverview Cmty Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 893, 337 P.3d 1076, 1079 (2014); *Grant Cty. Fire Prot Dist No 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419, 423 (2004) ("[T]he common law doctrine of standing... prohibits a litigant from raising another's legal right.").

[7] The second element refers to the "interests" that the organization seeks to protect. *Firefighters*, 146 Wn.2d at 213-14. Here, the relevant interests are those of third party children and welfare recipients—neither of whom are represented in any capacity by SEIU

[8] It is doubtful SEIU possesses standing to bring this suit *as to any claim*. FFNs and other childcare providers form a very unique bargaining unit. RCW 41 56.028(3) clarifies that providers "are public employees solely for the purposes of collective bargaining [and] are not, for that reason, employees of the state for any purpose. But the Legislature sharply limited the representational scope of provider collective bargaining in RCW 41.56.028(2)(C). Litigating these claims is not a purpose to which SEIU is ***solely limited***

3. SEIU lacks standing to assert exemptions in RCW 42.56.230 and the prohibition in RCW 42.56.070(9).

a. SEIU lacks standing to represent the interests of third parties who are neither union nor bargaining unit members.

SEIU fails to satisfy the first two associational standing requirements established in *Firefighters*, 146 Wn.2d at 213-15. First, individuals whose interests are being represented by a party claiming associational standing have to be members of the association. Therefore, even if FFNs "had standing to sue in their own right," *Id.* at 214, the interests they would be seeking to protect are not the interests of SEIU's members.[9] The Constitution prohibits SEIU from representing the interests of nonmembers.

Second, nothing in the record *or* the law *or* the relevant CBA suggests that protection of non-member children's or welfare recipients' interests are germane to SEIU's purpose. *Id.* Unlike *Firefighters*, where the court concluded that the union's suit to recover damages to "its members'

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[9] *Firefighters* adopted the associational standing analysis provided by the U.S. Supreme Court in *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (U.S. 1977). There, the Court explained the first associational standing prong. "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Id*; *see also Save a Valuable Env't (SAVE) v. City of Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401, 404 (1978) ("We agree that a non-profit. . association which shows that one or more of its members are specifically injured by a government action may represent those members in proceedings for judicial review.") Here, the exemptions SEIU seeks to enforce in RCW 42.56.230 do not protect SEIU members from specific injury. Rather those exemptions are designed to protect the interests of non-union children or welfare beneficiaries.

retirement accounts [was] germane to those purposes[.]" because of the broad scope of that union's collective bargaining powers, *Id.* at 214 (internal citations omitted), the sharply limited scope of SEIU's representational capacity is defined by RCW 41.56.028, and bringing suit to protect the interests of third parties is not a purpose to which it is "***solely limited***." *See* RCW 41.56.028(2)(C)[10] SEIU fails the second *Firefighters* prong because its attempt to litigate on behalf of children or welfare recipients is wholly non-germane its limited purposes. *Id.*

Therefore, SEIU possesses "neither personal standing nor representational standing" to argue for nondisclosure based on RCW 42.56.230. *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 816, 83 P.3d 419, 430 (2004).

b. ***SEIU lacks standing to invoke RCW 42.56.070(9).***

Both the PRA's text and policy demonstrate that only an agency may invoke the commercial purposes prohibition in RCW 42.56.070(9). Section 070(9) states that *government entities* subject to the PRA "shall not" "give, sell or provide access to lists of individuals requested for commercial

[10] "Notwithstanding the definition of "collective bargaining" in RCW 41.56.030(4), the scope of collective bargaining for child care providers under this section ***shall be limited solely to*** (i) Economic compensation, such as manner and rate of subsidy and reimbursement, including tiered reimbursements; (ii) health and welfare benefits; (iii) professional development and training, (iv) labor-management committees; (v) grievance procedures; and (vi) other economic matters." RCW 41.56.028(2)(C) (emphasis added).

purposes... unless specifically authorized or directed by law." The provision specifically refers only to government agencies, and omits any reference to nongovernmental third parties.

The competing directives of §§ 080,[11] 070(1), 070(9), and 550 create a tension that government agencies are best equipped to navigate because only agencies possess all of the interests and motivations necessary to accomplish the purpose. The PRA specifically requires *agencies* to make all nonexempt public records available (§ 070(1)), the PRA specifically directs *agencies* not to disclose "lists of individuals that are requested for commercial purposes," (§ 070(9)), the PRA specifically tasks *agencies* with undertaking the necessary commercial purpose inquiry (§ 080), and the PRA specifically subjects all of those *agency* responsibilities to potential judicial review and penalties. *See* RCW 42.56.550;[12] *see also Ameriquest*, 177 Wn.2d at 486-87 ("[I]f an agency is claiming an exemption, the agency bears the burden of proving it applies. RCW 42.56.550(1)."); *see also Laborers Int'l Union of N. Am., Local No. 374 v. Aberdeen*, 31 Wn. App. 445, 450, 642 P.2d 418, 422 (1982) ("The burden of proving that the records

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[11] RCW 42.56.080 states. "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request except to establish whether inspection and copying would violate RCW 42.56.070(9) or other statute which exempts or prohibits disclosure of specific information or records to certain persons."

[12] RCW 42.56.550(3) reminds courts to "take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others."

should not be disclosed is on the public agency"). Importantly, § 550 provides for penalties against an agency who wrongfully withholds records, but such a remedy is unenforceable against a third party who frivolously obstructs the disclosure of records—as SEIU has done here.

The PRA only allows *agencies* to determine whether the requestor's purpose for public records is commercial, and then only allows *agencies* to *disclose* or *withhold* the records.[13] Not even the agency may seek an injunction under § 540 on the basis of the commercial purpose prohibition.[14]

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[13] SEIU suggests that adhering to the PRA's text and policy, which limits enforcement of the commercial purpose exemption to the government, removes "Any meaningful way to enforce the commercial purposes prohibition." SEIU Reply at 13. Such a position is illogical. First, it equates government enforcement to a lack of any meaningful enforcement. Second, all parties involved may ultimately challenge the *government*'s decision to exercise the commercial purpose decision. However an agency chooses to inquire about a requestor's intent, if it determines that the intended purpose is commercial, it would be prohibited from disclosing the records. Then, a requestor could challenge that conclusion by bringing suit pursuant to RCW 42.56.550, and all involved parties could obtain judicial review of the matter. Third, if an agency discloses records in good faith, attempting to comply with the PRA, it is immune from liability for "any loss or damage" that might result from disclosure. RCW 42.56.060. This, too, reflects the PRA's robust pro-disclosure policy. ***Meaningful enforcement of the PRA's provisions is best obtained by adhering to the PRA's provisions***. SEIU's concerns are unfounded.

[14] SEIU construes this position as "an attack on third parties' ability to invoke any exemption under RCW 42 56.540." SEIU Reply at 13-14. The commercial purpose prohibition focuses on the requestor's intent rather than all other exemptions which focus on the records, themselves This "purpose inquiry" *is exactly why* third parties should be barred from seeking an injunction by invoking the commercial purpose prohibition. Otherwise, third parties may target disfavored requestors with frivolous lawsuits (e.g., this case), indefinitely delay disclosure, and substantially impinge PRA rights—all without the possibility of facing a penalty for acting improperly. *See* RCW 42.56 550. Ironically, while SEIU argues it should be permitted to seek an injunction by invoking RCW 42.56.070(9), it then argues that it need not satisfy the requirements of the PRA's injunction statute (§ 540). SEIU further cites *Robbins, Geller, Rudman & Dowd, LLP v State*, apparently to support its position that a private party can use § 540 to invoke the commercial purposes prohibition in § 070(9), but that case directly contradicts SEIU's position. 179 Wn App. 711, 731, 328 P.3d 905, 915 (2014), stating

SEIU urges this Court to place its imprimatur on its newly minted method of harassing requestors and clogging the courts. But a nongovernmental party who seeks an injunction on the basis of RCW 42.56.070(9)'s commercial purpose prohibition has none of the PRA's severe incentives intended to ensure proper navigation of the tension created by §§ 080, 070(9), 070(1), and 550. In fact, a party that wants to defeat disclosure for merely ideological reasons, as is the case here, has every incentive to use the forum provided by § 540 as a means to delay and attack a disfavored requestor—all without fear of penalty, unlike the State, which faces liability for wrongful withholding. *See* § 550. This Court should affirm the PRA's text and policy that allow agencies—and agencies alone—to enforce the commercial purpose inquiry required by §§ 080 and 070(9).

B. *THE TRIAL COURT ERRED BY ISSUING A TRO WHEN SEIU FAILED TO MEET THE LEGAL STANDARD FOR OBTAINING A TRO.*

SEIU attempts to rewrite both the record and relevant case law. SEIU Reply at 31-37. The trial court below *failed* to follow the *Kucera*[15] analysis

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> Section 540 evidence[s] a conscious choice of the voters of our state to constrain agency discretion and empower private parties to enforce the provisions of the PRA, *including the* ***exemptions*** *therein.* Because *the PRA includes an express provision giving interested parties the right to seek judicial determination that records are* ***exempt*** and an injunction preventing their disclosure.

Id. (emphasis added). *Robbins* recognized that RCW 42.56.540 permits private parties to enforce PRA "exemptions." If, as SEIU repeatedly suggests, "prohibitions" differ categorically from "exemptions," then the commercial purposes prohibition may not be enforced by nongovernmental parties under § 540.

[15] *Kucera v. State, Dept of Trans.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) sets forth the

necessary for a TRO, much less the additional *Ameriquest* analysis required by RCW 42.56.540.[16] Nevertheless, it still issued a TRO and explained that:

> There is admittedly a conflict, a tension between that apparent standard [the "standards" set forth in *Northwest Gas* and Division II *Ameriquest*] and the *Tyler Pipe* standard of what needs to be shown in order to be entitled to injunctive relief at the stage of a temporary restraining order... I am left with the result that the *Tyler Pipe* standard, while still applicable, is construed in the context of the [Division II] *Ameriquest* case which causes this court great hesitancy to deny a temporary restraining order in a public records case on temporary restraining order briefing which, you know, it is two and a half inches of material submitted 24 hours ago... So here's the bottom line. I'm going to issue a temporary restraining order restraining the release of these documents that are responsive to both requests until January 9th.

RP 12/19/14 at 32-33. Thus, the trial court granted a TRO barring disclosure of public records without considering or analyzing the requirements necessary to grant a TRO under the PRA. The court did so because of its confusion over *Northwest Gas*[17] and Division II *Ameriquest*—not because

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same injunction standard expressed in *Tyler Pipe Indus. V. Dep't of Revenue*, 96 Wn 2d 785, 638 P 2d 1213 (1982). The trial explicitly referenced *Tyler Pipe*. SEIU also does so in its papers. The *Kucera* or *Tyler Pipe* standard for obtaining a preliminary injunction requires the moving party to demonstrate it is likely to prove at trial that "(1) it has a clear legal or equitable right, (2) that it has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to it." Kucera,

[16] *Ameriquest*, 177 Wn.2d at 486-87 sets forth the injunction standard in a PRA case:

> The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. If it is another party, besides an agency, that is seeking to prevent disclosure, then that party must seek an injunction. RCW 42.56.540. ***In such a case, the party must prove (1) that the record in question specifically pertains to that party, (2) that an exemption applies, and (3) that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function.***

[17] *Northwest Gas Ass'n v. Washington Utilities and Transp. Com'n*, 141 Wn. App. 98 (Div 2 2007).

it "balance[d] the equities"[18] or found a likelihood of merit in any of SEIU's theories.[19] The Trial court erred by failing to conduct the required analysis. And to the extent *Northwest Gas* and Division II *Ameriquest* direct trial courts to forego the required analyses in *Ameriquest*, 177 Wn.2d 467, 486-87, if they do so at all, they should be overturned.

Yet the trial court also erred by relying on *Northwest Gas* and Division II *Ameriquest* in the first place. In *Northwest Gas*, the trial court denied the preliminary injunction *and then ordered disclosure of the disputed records* without the notice required by CR 65(a)(2).[20] *Northwest*

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[18] On pages 35-37 of its Reply, SEIU explains what it wishes the trial court *would have* done at the TRO hearing. But a review of the transcript quickly reveals that the court undertook no such "balancing." SEIU is correct that *Northwest Gas* and Division II *Ameriquest* made the trial court "wary of denying injunctive relief," but that ***is not the law***. A court must make specific findings in order to grant a TRO, not to deny one. [Cite CR here.] To the extent *Northwest Gas* and Division II *Ameriquest* shift the equitable burden to the nonmoving party and the records requestor, they both conflict with well-settled principles and the PRA's policy. *See* RCW 42.54.540; *see also Kucera*, 140 Wn.2d at 209 ("An injunction is... a 'transcendent or extraordinary remedy,' and... ***should be used sparingly and only in a clear and plain case***.") (emphasis added); *see also Rabon v City of Seattle*, 135 Wn.2d 278, 285, 957 P 2d 621, 623 (1998) ("***An injunction will not be issued in a doubtful case***.") (emphasis added). The trial court erred by granting a TRO.

[19] Contrary to what SEIU insinuates (SEIU Reply at 34-35 and n. 41), the trial court never determined SEIU had satisfied the *Tyler Pipe* requirements as to its specious First Amendment Free Association claim. The trial court's short discussion of this claim resulted in the following statement: "I have done some time with the cases trying to understand that, and it's not clear to me as I sit here with less than 24 hours of time to consider it. RP 12/19/14 at 33 SEIU is correct that it had to scuttle this claim once it was forced to stipulate to the rather obvious fact that a list of FFNs including union *nonmembers* would not be tantamount to a union membership list.

[20] CR 65(a)(2) states:

> Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

Gas, 141 Wn. App. at 110. In Division II *Ameriquest* the trial court also denied a preliminary injunction *and ordered disclosure*. *Ameriquest Mortg. Co.*, 148 Wn. App. at 154. Yet when considering a TRO requested under RCW 42.56.540, the trial court's power is limited to granting or denying the TRO—not additionally ordering the disclosure of records. Simple denial of a TRO or injunction does not implicate CR 65(a)(2). *See Does v. King Cty.*, No. 72159-3-I, 2015 WL 9461599 at *4, __Wn. App. __ (Div. 1 Dec. 28, 2015). The trial court erred by foregoing the required TRO analysis.

Under § 540, a trial court's first task is to determine if an exemption applies. Only then may it consider the remaining criteria. *Franklin Cty. Sheriff's Office v. Parmelee*, 175 Wn.2d 476, 480-81, 285 P.3d 67, 69 (2012). Here, the trial court did neither. Failure to do so constitutes reversible error as a matter of law.

C. *THE FOUNDATION IS AGGREIVED BY THE TRIAL COURT'S ISSUANCE OF A TRO AND MAY SEEK APPELLATE REVIEW OF TIIAT TRIAL DECISION.*

SEIU incorrectly claims that the Foundation has not been aggrieved by the trial court's erroneous issuance of a TRO on December 19, 2014. At the January 9, 2015 Order ***Denying*** the Preliminary and Permanent Injunctions, the trial court nevertheless extended its December 19, 2014 Order Granting a TRO for 20 additional days. CP 522 ("The Temporary Restraining Order entered by this Court on December 19, 2014, shall remain in place for

twenty (20) calendar days following the entry of this Order"). This extension afforded SEIU the opportunity to seek and obtain an order from the Appellate Commissioner staying the expiration of that same TRO until the conclusion of this appeal. *See* Foundation's Stmt. Grounds for Direct Review, App. 110. Within its final Order, the trial court extended its erroneously granted TRO of December 19, 2014. CP 522. After concluding that SEIU failed to meet the requirements to obtain a preliminary injunction—***which are the same as those necessary to obtain a TRO***—the court extended its TRO, which was improperly granted in the first place. *See* § IV(B), *supra*. The TRO is thus subject to the same appellate review as the court's denial of the preliminary injunction. RAP 2.2(a)(1).[21]

Due to this erroneously granted TRO (and the trial court's later extension of it), the requested public records have remained undisclosed for more than a year without SEIU ever satisfying the legal requirements necessary to obtain injunctive relief. The Foundation's—and the public's—PRA rights "have been affected," and indeed violated. *State v. Taylor*, 150

[21] Further, SEIU cites only inapposite case law supporting its argument that appellate review of the trial court's TRO is improper under RAP 2.4(a). SEIU reply at 26. For instance, SEIU fails to acknowledge how the instant case substantially differs from cases like *State ex rel Carroll v. Simmons*, 61 Wn.2d 146, 149, 377 P.2d 421 (1962). In those cases, the trial courts' final judgments incorporated the temporary injunctions and made them final. Here, the TRO, based on some standard other than the proper one, was effectively reversed by the denial of the preliminary injunction, but the TRO was nevertheless extended for twenty days—and has now been extended until the conclusion of this case. On remand, that TRO would remain in effect, thus continuing its improper suppression of public records. Review of this issue is proper under RAP 2.4(a).

Wn.2d 599, 603, 80 P.3d 605 (2003). Here, "the *trial court* entered a judgment that substantially affects a legally protected interest of the would-be appellant." *Polygon Nw. Co. v. Am. Nat. Fire Ins. Co.*, 143 Wn. App. 753, 768, 189 P.3d 777, 785 (2008). Thus, the Foundation is an aggrieved party pursuant to RAP 3.1. Appellate review is appropriate.

D. *THE TRIAL COURT CORRECTLY DENIED AN INJUNCTION BASED ON RCW 42.56.070(9).*

Words have meaning.[22] Even if they are "broadly-stated" or "categorical," they are not boundless—as is SEIU's definition for "commercial purpose." SEIU does not like the Foundation's purpose in obtaining the records but that does not mean that its purpose is commercial. RCW 42.56 does not define "commercial," but "commercial" has a well-established common meaning[23] reaffirmed by the very authorities SEIU cites, and that meaning is not SEIU's incoherently broad definition. SEIU's definitional problem is the first and most fatal flaw in its commercial

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[22] It hardly seems necessary to provide authority for this assertion, but this Court has twice made this remark. *See Am Cont'l Ins. Co. v. Steen*, 151 Wn 2d 512, 521, 91 P.3d 864, 869 (2004), *as amended* (July 30, 2004) (defining a statute containing a broad, categorical prohibition on insurers retroactively annulling benefits); *see also State v Parmenter*, 50 Wn. 164, 180, 96 P. 1047, 1051 (1908) (construing the constitutional use of the word "property," the Court said "It is a cardinal rule of construction that the language of a state Constitution, more than that of any other written instrument, is to be taken in its general and popular sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and its ***words have meaning*** as they commonly understand them."). The same cardinal rule of construction applies here.

[23] Webster's Dictionary defines "commercial" as "Having financial profit as the primary aim." WEBSTER'S NEW INT'L DICTIONARY 538 (2d ed. 1954).

purposes argument. The second flaw is that none of its "evidence" of the Foundation's activities, generally, addresses the only relevant inquiry under RCW 42.56.070(9): the Foundation's purpose for *these* records.

The first and central issue is the definition of "commercial." In its Reply, SEIU continues to assert that Attorney General Opinions ("AGO") support its broad definition of commercial purposes. Yet as the Foundation described in its Opening Brief, SEIU's arguments simply do not comport with the AGOs themselves. The AG may understand RCW 42.56.070(9) to be a broad, categorical exemption, but it *consistently defines commercial as "any profit expecting business activity."* 1975 Wash. Op. Atty. Gen. No. 15 at 10 (1975);[24] 1988 Letter Op. Atty. Gen. No. 12 at n. 4 (defining "commercial" as "profit-expecting");[25] *see also* 1998 Wash. Op. Atty. Gen. No 2 at 2 (1998) ("[T]he word commercial broadly encompasses any profit expecting business activity.").[26] Thus, under the AGOs' own reasoning,

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[24] Available at http://www.atg.wa.gov/ago-opinions/access-lists-individuals-under-initiative-no-276 (last visited Jan. 4, 2016). In fact, this AGO is especially helpful because it concluded a nonprofit antique car club's planned solicitation of individuals on a requested list intended to inform those individuals of the club's existence and invite them to participate in the club's activities was not a commercial purpose because the club was "not a commercial entity and the use to which the information would be put is not commercially oriented." *Id.* Here, the Foundation is clearly not a commercial entity, and the purpose to which the information will be put—informing FFNs of their constitutional rights—is clearly not commercially oriented.

[25] Available at http://www.atg.wa.gov/ago-opinions/confidential-income-information#sthash.bUO2Xvip.dpuf (last visited Jan. 4, 2016)

[26] Available at http://www.atg.wa.gov/ago-opinions/authority-public-agencies-allow-inspection-and-copying-lists-individuals (last visited Jan. 4, 2016).

RCW 42.56.070(9) is applicable only if a requestor intends "to use the list of individuals in such a manner as to facilitate" "*any profit expecting business activity*." 1998 Wash. Op. Atty. Gen. No 2 at 2 (1998) (emphasis added). As stated repeatedly, the Foundation intends to use of the list to inform FFNs of their constitutional rights, CP 337-38, which clearly does fit under any definition of "commercial purpose."

SEIU continues to unpersuasively cite inapposite federal case law in an attempt to support its excessively broad definition of commercial purposes. First, any reliance on cases interpreting the federal Lanham (Trademark) Act are completely unpersuasive when defining a term in Washington's PRA. The trial court correctly held that "based upon powerful preferences for disclosure, conclusion[s] under federal Lanham Act law, with completely different interests, are simply not helpful." RP 10/16/14 at 64. As for the FOIA cases, SEIU is incorrect that the Foundation failed to explain why its FOIA cases were unhelpful to the task of defining commercial in RCW 42.56.070(9). SEIU Reply at 8, n. 10. The Foundation does not dispute that "Washington courts often look to judicial constructions of FOIA in construing ***similar*** provisions in the PRA." Foundation Opening Brf. at 24. But the statutory provisions interpreted in the cited federal cases are not similar to the PRA. The FOIA cases cited by SEIU (twice now) address the issues of fee waivers and attorneys' fees, ***not***

disclosure of records.[27] The Foundation has already demonstrated why SEIU's cited FOIA cases are unhelpful in defining "commercial" under the PRA. *See* Foundation Opening Brf. 24-26.

Additionally, *Veterans Ed. Project v Sec'y of Air Force*, 509 F. Supp. 860, 862 (D.D.C. 1981) *aff'd sub nom. Veterans Educ. Project v. Sec'y of the Air Force*, 679 F.2d 263 (D.C. Cir. 1982), cited by DSHS, provides instructive guidance for a case that closely parallels the instant situation. DSHS Response Brf. at 22. When "the only purpose [of the requestor] in obtaining the records was to inform veterans of their statutory rights," its purpose was deemed non-commercial. *Veterans Ed. Project v. Sec'y of Air Force*, 509 F. Supp. 860, 862 (D.D.C. 1981) *aff'd sub nom. Veterans Educ. Project v. Sec'y of the Air Force*, 679 F.2d 263 (D.C. Cir. 1982). Informing FFNs of their constitutional rights cannot be construed as "commercial" under both the term's plain meaning and applicable case law.

Furthermore, nothing in any of the authorities allows SEIU to define

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[27] This distinction is key because, as observed in *Hoppe*, the U.S. Supreme Court "has observed that the FOIA seeks to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language. . The federal courts have also recognized a mandate to construe the FOIA broadly, and to construe the exemptions narrowly." *Id.* at 128-29 (citing *NLRB v Sears, Roebuck & Co.*, 421 U.S. 132, 136-37 (1975) and other federal cases). The FOIA cases SEIU cites were not interpreted by the federal courts under this standard because those cases did not involve disclosure itself, but only fee waivers. Thus, the FOIA cases cited by SEIU are not even helpful in interpreting FOIA's own appropriate disclosure standard, which is exactly what is at stake in the instant case. The federal cases cited by SEIU are of *no help at all* when construing Washington's PRA—which has a policy of disclosure even more severe than the federal FOIA.

"commercial" as broadly as it attempts. Thus, its repeated insistence that the commercial purposes prohibition is "broad," "categorical," and even "absolute" makes no difference. *If the purpose of the request is not commercial, the prohibition is not triggered.* Here, the Foundation's purpose is clearly non-commercial, so SEIU's lengthy discussion on statutory construction, SEIU Reply at 1-4, is irrelevant.

This Court should reject SEIU's unsupported definition of "commercial purpose"[28] and affirm the trial court's holding, which honors the cited authorities and the PRA's plain meaning, policy, and language.[29]

E. *THE TRIAL COURT CORRECTLY CONCLUDED THE RECORDS WERE NOT EXEMPTED BY RCW 42.56.230.*

SEIU continues to erroneously insist that the records are exempt from disclosure because they are "tantamount" to the disclosure of exempted personal information, "such as a child's location on a daily basis, and information about welfare recipients." SEIU Reply at 16-21. It further

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[28] SEIU is incorrect that with RCW 42.56.070(9), the Legislature "has already decided that disclosure of such records would be contrary to the public interest and harmful to a vital government function." If that were true, then how could it justify the built-in exceptions to the commercial purposes prohibition? The fact is, SEIU argues RCW 42.56.540 is an appropriate vehicle whereby nongovernmental parties can invoke the commercial purposes prohibition (the Foundation contests this). But here, it seeks to shirk the necessary showings under § 540. SEIU wants but cannot have it both ways. Rather, if the prohibition is as categorical as SEIU contends, then under the PRA's design, only the government may invoke it. If the prohibition is like an exemption, it is narrowly construed and must satisfy all the requirements of § 540. Either way, the result is disclosure.

[29] The Foundation suggests this definition ***for an agency to properly withhold records under RCW 42.56.070(9), a requestor's primary purpose for the requested records must be to achieve financial profit through the direct use of the requested records.***

denies that it puts forth the oft-rejected "connect-the-dots" argument, *Id.* at 17, and then proceeds to connect the dots.

The Foundation requested lists of FFNs—not the children or welfare recipients for whom they care. In order to learn any details about the children or welfare recipients for whom those FFNs care, the Foundation would also have to possess other, additional information *not* in the requested records.[30] The Foundation possesses none of this additional information, but that fact is irrelevant because in order to conclude that these records contain the personal information of individuals not listed in the records, a court would have to look beyond the "four corners of the records at issue." *Koenig v. City of Des Moines*, 158 Wn.2d 173, 183, 142 P.3d 162, 166 (2006).

> The fact a requester may potentially connect the details of a crime to a specific victim ***by referencing sources other than the requested documents*** does not render the public's interest in information regarding the operation of the criminal justice system illegitimate or unreasonable. ***To hold otherwise would eviscerate the act's policy of favoring openness and disclosure.***

Id. at 187; *King County v. Sheehan*, 114 Wn. App. 325, 346 (2002) (concluding that the possibility that nonexempt records could be "used to obtain other personal information from various sources... is not sufficient to prevent disclosure" of otherwise nonexempt records).

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[30] For example, the specific FFNs who care for specific children, the locations where the FFNs provide care; the times during each and every week (both generally and specifically) when specific children receive care from specific FFNs at specific locations etc

The trial court below correctly determined that exempting records on such a basis violates the PRA's own interpretive mandate. *See* RCW 42.56.030.[31] As this Court has remarked, "[t]he disclosure of public records remains our primary objective even when reconciling competing policy considerations expressed in the act." *Koenig*, 158 Wn.2d at 187.[32] This is reason enough why *Koenig* and *Sheehan* should not be overruled, as SEIU suggests. The records are not exempt under RCW 42.56.230.

F. *THE TRIAL COURT CORRECTLY DENIED SEIU'S REQUEST FOR INJUNCTIVE RELIEF ON THE BASIS OF ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.*

SEIU merely restates its original position that it was entitled to an injunction based on FFNs' right to privacy guaranteed by Article I, § 7 of the Washington Constitution. SEIU Reply at 21-24. The Foundation provided four reasons why SEIU's constitutional theory is unavailing in its Opening Brief, Foundation Opening Brf. at 39-45, but SEIU only responded to one; (namely, that FFNs do not possess a reasonable expectation of privacy in information they have "*voluntarily* disclosed *to the government*

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[31] "This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected."

[32] SEIU still cannot explain how information relating to FFNs is actually the "information relating to... a particular" child or welfare recipient under the definition set forth in *Bainbridge Island Police Guild v. Puyallup*, 172 Wn.2d 398, 411-12 (2011). It also cannot begin to show (and did not even attempt to show) the additional requirements it must under RCW 42.56.540: namely, that disclosure "would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions."

to receive *public* funds pursuant to a *public program* established by state law."). *Id* at 45 (original emphasis). It then asserts that the government "cannot condition the receipt of benefits on the waiver of such rights." SEIU Reply at 23 (quoting *Bedford v. Sugarman*, 112 Wn.2d 500, 518, 772 P.2d 486 (1989) (Utter, J. concurring)). However, *Bedford* addressed the privacy rights of welfare beneficiaries, themselves. Here, the Foundation requested information for childcare providers, not welfare beneficiaries. But even if *Bedford* applied to childcare providers, that case concluded that welfare beneficiaries who "lived in the residential center voluntarily... thus experienced a lessened expectation of privacy" because "they in fact [had] made a choice: to live in the institutional environment provided by the [welfare] program." *Id.*

SEIU can cite no authority for the proposition that FFNs, who voluntarily submitted their information to the state in order to receive taxpayer-funded payments, enjoy a heightened expectation of privacy that is violated by PRA disclosure of their names and business contact information.[33] Thus, SEIU's argument is still unavailing.

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[33] Additionally, *Bedford* states: "the right of confidentiality... in its broadest application, protects against disclosure only of certain particularized data, information or photographs describing or representing *intimate* facts about a person. The case law does not support the existence of a general right to nondisclosure of private information." 112 Wn 2d at 511-12 (emphasis added) "Intimate" is defined as "belonging to or characterizing one's deepest nature," or "of a very personal or private nature." Available at http://www.merriam-webster.com/dictionary/intimate (last visited Dec 30, 2015). FFNs' names and business contact information hardly qualify as "intimate" information protected from disclosure (to

Given that SEIU has not attempted to contradict the Foundation's other arguments on Article I, § 7, Foundation Opening Brf. at 39-45, this Court should reject SEIU's state constitutional claim.

G. *FREEDOM FOUNDATION IS ENTITLED TO ATTORNEYS' FEES AND COSTS.*

An award of attorney fees is discretionary, and the equitable considerations in this case present the *exact* type of circumstance that warrants a discretionary award of the Foundation's attorney fees.[34] Unlike the plaintiffs in *Johnson*—which SEIU incorrectly contends is identical to the instant case—SEIU lacked *any* right, or even standing, to prevent disclosure and secure a TRO in the first place. "[I]n determining whether attorney fees are appropriate, [the court] cannot simply look at whether the TRO was subsequently dissolved. Rather, the court must determine whether it was reasonable for [party awarded a TRO] to seek injunctive relief in the first place." *Cornell Pump Co. v. City of Bellingham*, 123 Wn. App. 226, 236 (Div. I 2004) (distinguishing *Quinn* and *Johnson*).[35]

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the government) by the constitutional right to privacy. This confirms that no "generalized constitutional right of privacy under Article I, Section 7 attaches to the names and addresses of the individuals." RP 01/09/15 at 39; CP 516-18.

[34] Courts possess the discretion to award attorneys fees if raised for the first time on appeal. *In re Dependency of MSR*, 174 Wn.2d 1, 12 (2012) (holding that the court had the authority to consider issues raised for the first time on appeal). Here, even though the Foundation first requested attorney's fees on appeal, the equitable considerations heavily weigh in favor of the court awarding such costs and fees.

[35] If SEIU is granted standing under RCW 42.56.540 to seek enforcement of the commercial purposes prohibition in § 070(9), then it should likewise be subjected to § 550's penalties and attorneys' fees liability for wrongfully withholding the records.

Here, like in *Cornell*, SEIU cannot claim that it sought a TRO to preserve its "rights" when such "rights" lack any foundation in law or policy. It does not even possess standing to assert its claims. And the award of fees reaffirms the PRA's pro-disclosure policy by discouraging parties from frivolously obstructing the disclosure of public records where no legitimate rights are implicated.[36] Parties who argue meritless and convoluted claims simply because they want to delay or defeat disclosure of records are not immunized from reimbursing fees simply because they label their meritless claims, "rights."

II. CONCLUSION

For the foregoing reasons, this Court should uphold the trial court's decision to deny a preliminary and permanent injunction. This Court should also reverse the trial court's decision with respect to 1) its December 19, 2014 issuance and January 9, 2015 extension of a TRO based solely on CR 65(a)(2); 2) its holding that SEIU possessed standing pursuant to *Ameriquest*, 148 Wn.App. 145; and its holding that SEIU established associational standing to assert PRA exemptions in RCW 42.56.230; and 3) its holding that SEIU possessed standing to seek an injunction under RCW

[36] "The purpose of this equitable rule [where a trial court may award attorneys fees when a party who prevails in dissolving a wrongfully issued TRO] is to discourage parties from seeking unnecessary injunctive relief prior to a trial on the merits." *Cornell*, 123 Wn App. at 233. A party seeks unnecessary injunctive relief when a party's argument for injunctive relief lacks merit. *Id.* at 235

42.56.540 pursuant to RCW 42.56.070(9). This Court should also order the payment of the Foundation's attorneys' fees and costs below and on appeal.

RESPECTFULLY SUBMITTED this 4th day of January, 2016.

FREEDOM FOUNDATION

By: _____
David M.S. Dewhirst, WSBA #48229
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482
DDewhirst@myfreedomfoundation.com

FREEDOM FOUNDATION

By: _____
James G. Abernathy, WSBA #48801
P.O. Box 552, Olympia, WA 98507
p. 360.956.3482
JAbernathy@myfreedomfoundation.com

Attorneys for Cross-Appellant/Respondent Freedom Foundation

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 4, 2016, I filed with the Court by e-mail and I served by e-mail, pursuant to agreement, the foregoing document and this certificate of service upon:

Robert H. Lavitt
Danielle Franco-Malone
Law Offices of Schwerin Campbell
18 West Mercer Street, Suite 400
Seattle, WA 98119
lavitt@workerlaw.com
franco@workerlaw.com
woodward@workerlaw.com
schnarr@workerlaw.com

Morgan Damerow
Janette E Sheehan
Albert Wang
Assistant Attorney General
Office of the Attorney General
7141 Cleanwater Drive SW
PO Box 40145
Olympia, WA 98504-0145
MorganD@atg.wa.gov
JanettaS@atg.wa.gov
AlbertW@atg.wa.gov

Dated this 4th day of January, 2016, at Olympia, Washington.

Kirsten Nelsen

OFFICE RECEPTIONIST, CLERK

To: Kirsten Nelsen, David Dewhirst; James Abernathy; Stephanie Olson, Nick Dagostino; michele@alliedlawgroup com, info@alliedlawgroup.com; wendyk2@atg.wa.gov; morganD@atg wa gov; janettaS@atg wa.gov; JaneC@atg.wa gov, LPDarbitration@atg.wa gov; lavitt@workerlaw.com, franco@workerlaw com; schnarr@workerlaw com; woodward@workerlaw.com, albertw@atg wa gov

Subject: RE. Reply of Cross-Appellant/Respondent Freedom Foundation

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To: David Dewhirst <DDewhirst@myfreedomfoundation.com>; James Abernathy <jabernathy@myfreedomfoundation.com>; Stephanie Olson <SOlson@myfreedomfoundation.com>; Kirsten Nelsen <KNelsen@myfreedomfoundation.com>; Nick Dagostino <ndagostino@myfreedomfoundation.com>; michele@alliedlawgroup.com; info@alliedlawgroup.com; wendyk2@atg.wa.gov; morganD@atg.wa.gov; janettaS@atg.wa.gov; JaneC@atg.wa.gov; LPDarbitration@atg.wa.gov; lavitt@workerlaw.com; franco@workerlaw.com; schnarr@workerlaw.com; woodward@workerlaw.com; OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; albertw@atg.wa.gov
Subject: Reply of Cross-Appellant/Respondent Freedom Foundation

Good Afternoon,

Please find attached for filing today in Case No. 91715-9 Freedom Foundation's Reply Brief.

Please notify me immediately if you have any difficulties opening the attachment.

Best,

Kirsten Nelsen
Paralegal | Freedom Foundation

knelsen@myFreedomFoundation com
360.956.3482 | PO Box 552 Olympia, WA 98507
myFreedomFoundation com